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In The Supreme Court of the United States

Robert Stewart, as Chief of the South Carolina Law Enforcement Division, Henry McMaster, as Attorney General of the State of South Carolina and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Petitioners,

vs.

Jimmy Martin and Lucky Strike, LLC,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) apply to a facial constitutional challenge that South Carolina's anti-gambling statutes violate the Due Process and Equal Protection Clauses when South Carolina has created complex state administrative and judicial mechanisms that provide timely and adequate state court review of gambling forfeiture decisions and when this Court has previously ruled that the virtually identical South Carolina statutes are not violative of these Clauses of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners Robert Stewart, as Chief of the South Carolina Law Enforcement Division, Henry McMaster, as Attorney General of the State of South Carolina and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit, were Defendants in the District Court and Appellees in the Court of Appeals.

Jimmy Martin and Lucky Strike, LLC, were Plaintiffs in the District Court and Appellants in the Court of Appeals and are Respondents here.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of South Carolina on behalf of himself, the Chief of the South Carolina Law Enforcement Division and the prosecutor for the Ninth Judicial Circuit of South Carolina, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case..

OPINIONS BELOW

The district court's opinion granting Petitioners' Motion to Dismiss (*Pet. App.* a51-a63) is reported at 438 F.Supp.2d 603 (D.S.C. 2006). The court of appeals opinion is reported at 499 F.3d 360, 25 A.L.R. Fed.2d 687 (4th Cir. 2007). (*Pet. App.* a1-a47). The order denying the Petition for Rehearing and Rehearing En Banc is found at *Pet. App.* a64-a65.

JURISDICTION

The court of appeals entered its judgment on August 29, 2007. A petition for rehearing and rehearing en banc was denied on September 20, 2007. *Pet. App.* a64-a65. The Court extended the time for filing the Petition for Certiorari until February 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

South Carolina's gambling statutes being challenged as unconstitutional are codified at S.C.

Code Ann. Sections 12-21-2710 and 12-21-2712. (2006). *Pet. App.* a66-a67.

STATEMENT

STATEMENT OF THE CASE

Procedural Background

South Carolina's anti-gambling statutes [S.C. Code Ann. Sections 12-21-2710 and 12-21-2712 (2006)], see *Pet. App.* a-66-a67, provide that slot machines, video poker machines, specific video games and any "other device pertaining to games of chance" are illegal and may not be possessed. Such possession is a crime. Pursuant to Section 12-21-2712, law enforcement officers must seize these devices and take them before a magistrate, who determines their legality under § 12-21-2710, on a machine-by-machine basis. *Allendale Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 606 S.E.2d 471 (2004). Devices violative of Section 12-21-2710 are ordered destroyed, subject to the right of the owner to a post-seizure hearing and appeal. *Mims Amusement Co. v. SLED*, 366 S.C. 141, 621 S.E.2d 344 (2005).

Respondents sought declaratory and injunctive relief in federal court, contending that Sections 12-21-2710 and 12-21-2712 violate the Due Process and Equal Protection Clauses. Specifically, Respondents' Complaint contends that Section 12-21-2710 is void for vagueness, and thus violates the Due Process Clause. Moreover, it is alleged that the failure of the two statutes to provide a pre-enforcement mechanism for

determining the legality of a particular type of machine or device contravenes the Equal Protection Clause. Finally, Respondent contends the State has discriminatorily enforced these statutes. *Pet. App.* a68-a81.

The District Court dismissed the action, abstaining under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Pet. App.* a51-a63. Respondents appealed, and the Fourth Circuit panel reversed, over a vigorous dissent by Judge Wilkinson. The majority deemed *Burford* inapplicable essentially because Respondents are challenging the "facial" constitutionality of Sections 12-21-2710 and 12-21-2712. In the view of the majority, Respondents' claims "present no difficult questions of state law whose importance outweighs the federal interest in adjudicating Martin's constitutional case," nor do the claims "threaten a state interest in uniform regulation that outweighs the federal interest in adjudicating the case." *Id.* at a12. The panel concluded that if successful, Respondents would be entitled to have enjoined "all enforcement of the statutes at issue; such relief could not possibly threaten their *uniform* application." *Id.* at a15. (emphasis in original).

The Petitioners sought rehearing, which was denied on September 20, 2007. *Pet. App.* a64-a65. Petitioners again contended that *Burford* abstention is applicable notwithstanding Respondents' claims that Sections 12-21-2710 and 12-21-2712 are unconstitutional. Moreover, Petitioners argued that this Court's summary affirmance in *Holliday v. State*,

335 U.S. 803 (1948), (affirming 78 F.Supp. 918 (W.D.S.C. 1948)), which upheld a three-judge court's determination that similar predecessor provisions of these South Carolina statutes do not violate the Due Process and Equal Protection Clauses, strongly supports *Burford* abstention. *Id.* at a114-a130. The time for filing having been extended by the Court, our Petition is timely.

South Carolina Gambling Law

South Carolina long ago sought to prohibit gambling devices. In 1931, the Legislature enacted a comprehensive ban in what is now Sections 12-21-2710 and 12-21-2712. These provisions, with certain exceptions, remain today largely unchanged. *Westside Quik Shop v. Stewart*, 341 S.C. 297, 300-302, 534 S.E.2d 270, 271-272, (2000), *cert. den.* 531 U.S. 1029 (2000) [history of statutes discussed]. The additions, since 1931, largely focus upon video poker. Following extensive debate, Act No. 125 was enacted in 2000, and added video poker and other video games to the statutes' ban. Pursuant to the statute, slot machines, video poker machines, keno, blackjack, and other devices "pertaining to games of chance," are declared illegal *per se*.[1] Possession constitutes a crime, and law

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[1] As noted above, in 2000, by Act No. 125, the Legislature amended the statute to add video poker machines ["video game machine with a free play feature operated by a slot or thing of value"] and other video games such as blackjack, keno, lotto, bingo or craps. However, except for minor consolidations, the remainder of Section 12-21-2710, including the language "pertaining to

(continued...)

enforcement is authorized to seize such devices and take them to a magistrate for determination of illegality. The magistrate must order devices deemed illegal under Section 12-21-2710 destroyed.[2]

An owner may seek a post-seizure hearing to contest the magistrate's initial determination of illegality. *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). Forfeiture is machine-by-machine before the magistrate – the exclusive forum for such matters. *Allendale County Sheriff's Office*, 361 S.C. *supra* at 587, 606 S.E.2d *supra at* 474. The owner may appeal to the circuit court, and then to the appellate courts. *Mims Amusement Co. v. SLED, supra.* The statutes' purpose is clear: forfeiture of gambling devices "serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable." *Westside*, 341 S.C., *supra* at 304, 534 S.E.2d *supra* at 273 (2000), citing *Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

In 1948, a wide-ranging constitutional attack was launched in federal court against these statutes. In *Holliday v. State*, *supra*, plaintiff sought to enjoin these virtually identical statutes as violative of the Due Process and Equal Protection Clauses, alleging the

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[1](...continued)
games of chance," has been present since 1931.

[2] The language of Section 12-21-2712 has remained virtually unchanged since 1931.

laws "unconstitutional, null and void and in violation of the Fourteenth Amendment of the United States Constitution." 78 F.Supp., *id.*, at 921. A three-judge court upheld the anti-gambling statutes as constitutional, as "clearly a valid exercise of the police power of the State of South Carolina, and constitute[ ] no attempt on the part of the state to deprive plaintiff of his property without due process of law." *Id.* at 925. According to the three-judge court, "[t]he General Assembly of South Carolina, under its police power, had the right to declare such machines gambling machines *per se*, and as such illegal in the State of South Carolina." *Id.*

Holliday also contended before this Court that these statutes violate both Due Process and Equal Protection. See, *Pet. App.* a131-a160. (Appellant's Jurisdictional Statement and Brief). *Holliday's* arguments, like Respondents', were that the statutes arbitrarily deprived him of innocent property by declaring his particular gaming devices contraband *per se* and thus subject to destruction pursuant to present § 12-21-2712. *Id.* at a138. However, this Court summarily affirmed the three-judge court, thus finding the statutes constitutionally valid. 335 U.S. 803 (1948).

Sections 12-21-2710 and 12-21-2712 and its predecessors have been consistently enforced and upheld by the state Supreme Court. Over the decades, much case law regarding these provisions' applicability and constitutionality has been adjudicated. See, *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932); *Alexander*

v. Martin, 192 S.C. 176, 6 S.E.2d 20 (1939); *State v. Appley*, 207 S.C. 284, 35 S.E.2d 835 (1945); *Ingram v. Bearden*, 212 S.C. 399, 47 S.E.2d 833 (1948); *Squires v. SLED*, 249 S.C. 609, 155 S.E.2d 859 (1967); *State v. DeAngelis*, 257 S.C. 44, 183 S.E.2d 906 (1971); *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995); *State v. One Coin Operated Video Game Machine*, 321 S.C. 176, 467 S.E.2d 443 (1996); *State v. 192 Coin-Operated Video Game Machines, supra*; *Allendale County Sheriff's Office v. Two Chess Challenge II, supra*; *Westside, supra*; *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 600 S.E.2d 61 (2004); *Mims Amusement Co. v. SLED, supra*. These cases have addressed the statutes' conformity with procedural due process (*State v. Kizer, supra*; *State v. 192 Coin-Operated Video Game Machines, supra*); alleged vagueness (*State v. DeAngelis, supra)*; purported Equal Protection violations (*State v. 192 Video Game Machines, supra*; *Sun Light, supra)*; trial by jury (*Mims Amusement Co., supra*); and the statutes' alleged unconstitutional "taking" *(Westside, supra)*. The statutes have been applied to slot machines, pin ball machines, remnants of machines, and video games. Over the years, the state Supreme Court has diligently applied these gaming statutes consistently with the federal Constitution.

REASONS FOR GRANTING THE PETITION

Summary of Argument

In this case, the Fourth Circuit panel, by a 2-1 split, reversed the District Court's decision to abstain

under *Burford*. Essentially, the panel's majority found abstention unwarranted, premised upon the illogic that, because Respondents allege the forfeiture statutes are facially unconstitutional as vague and discriminatory, *Burford* is inapplicable. In the circumstances of a 'facial" attack upon the State's regulatory scheme, concluded the majority, federal court intervention does not "possibly threaten [the] ... *uniform* application" of the State's regulatory scheme. *Pet. App.* a15 (emphasis in original).

The majority thus created a new exception to the *Burford* doctrine, an exception which this Court has rejected, and one which is inconsistent with decisions in other circuits. Indeed, it did so, mindful that this Court previously concluded in *Holliday, supra* that the similar predecessor forfeiture statutes to South Carolina's amended version do *not* violate the Due Process and Equal Protection Clauses. These are the very constitutional provisions which Respondents assert here, and it is these provisions which form the basis for the majority's "facial" exception to *Burford*.

With the panel's ruling, Respondents and other federal plaintiffs may now avoid the state forfeiture process altogether, as well as disregard state court interpretations concerning that process. See, *e.g. Allendale, supra*. It is evident Respondents do not like these state court decisions such as requiring "machine by machine" forfeiture adjudicated in a post-seizure proceeding. *Pet. App.* a77. [alleging Respondents' desire to market a "legal" machine in South Carolina]. Now, armed with a well-crafted complaint, machine

owners and other plaintiffs may proceed directly to federal court, having bypassed the state enforcement scheme on the basis that the federal Constitution insures a right to place machines on the market prior to a forfeiture proceeding. Such avoidance of the state forfeiture process upends the abstention doctrine and undermines the structure of federalism it preserves.

Here, in reversing the District Court's decision to abstain under *Burford*, the majority rejected the lower court's concern for avoiding entanglement in the intricacies of state gambling law. Instead, the majority found that since Respondents' claims constitute a "direct attack on the constitutionality of a statute, 'the kind of controversy federal courts are particularly situated to adjudicate ...,'" such claims "are not proper candidates for *Burford* abstention." *Pet. App.* a19-a20. However, in dissent, Judge Wilkinson astutely rejected the non-existence of any rule exempting "facial" claims, stating that the Fourteenth Amendment has not "reordered" federal and state relations "as to render *Burford* abstention virtually inapplicable to all constitutional challenges in federal court to specialized regulatory schemes." *Pet. App.* a28.

I. OVERVIEW OF THE CASE

This case invokes the fundamental principle of "Our Federalism" established by the Founding Fathers. At stake is South Carolina's ability under our federal system to perform the core state function of regulating gambling – through a system of seizure and forfeiture of contraband gambling devices and other "games of chance" – without intrusion by the federal courts.

South Carolina has had its forfeiture system proscribing slot machines and other "games of chance" in place since 1931. In 2000, after much debate and deliberation, the forfeiture statutes were amended by the South Carolina legislature to add "video poker" and other video games to the statutes' previous longstanding ban. In addition, in recent years, the state Supreme Court has further clarified these statutes, concluding that owners of seized machines are entitled to a post-seizure (not a pre-seizure) hearing, and that forfeiture is "machine-by-machine." In other words, legality under state law is not determined upon the basis of an entire class or category of machines, but only those individual machines seized and brought before the magistrate are adjudged. *Allendale, supra*; *Mims, supra*.

Justice Kennedy perhaps said it best: America's dual sovereignty structure is a work of "genius," premised upon the idea that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995), (Kennedy, J. concurring). Abstention protects these sacred values, thus enabling federal courts to exercise "wise discretion" by restraining "their authority because of 'scrupulous regard for the rightful independence of state governments ....'" *Burford*, 319 U.S., *supra* at 332. A federal court, in employing its equitable powers, thus may refrain from exercising jurisdiction if, upon balancing federal and state interests involved, determines "the State's interests are paramount and ... a dispute would best be adjudicated

in a state forum." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). Such circumstance warranting abstention includes the "avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships." *La. Power and Light Co. v. Thibodaux*, 360 U.S. 25, 32 (1959) (Brennan, J. et al. dissenting).

The abstention doctrine, as articulated through the decisions of this Court, does not recognize a "facial" constitutional claim exception, as the majority created, particularly where, as here, questions of racial discrimination or other fundamental rights are not involved, and a timely and adequate mechanism to review violations of any constitutional rights is available. *Compare, McNeese v. Bd. of Ed.*, 373 U.S. 668 (1963). To exempt altogether such constitutional claims effectively disregards the State's interest, embroils federal courts in the State's "internal affairs," thereby undermining the principle of federalism. *McNeese, Id.* at 677 (Harlan, J. dissenting). As Justice Rehnquist wrote in *Moore v. Sims*, 442 U.S. 415, 427 (1979), "[t]he breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it." (emphasis in original).

Martin v. Creasy, 360 U.S. 219, 224 (1959) recognizes that there is no broad rule eliminating abstention, as the majority fashioned. In *Creasy*, even though the lower court enjoined the State's administrative scheme as violative of Due Process, abstention was required to "avoid[ ] ... the unnecessary impairment of state functions." *Quackenbush, supra*

also cautioned that a rigid, "per se" approach to *Burford's* applicability is inconsistent with *Burford's* flexibility. 517 U.S., *supra* at 730. *See also, Younger v. Harris*, 401 U.S. 37, 45 (1971) [state courts are competent to address the constitutionality of state statutes]; *Harrison v. NAACP*, 360 U.S. 167, 176 (1959) [notwithstanding "facial" claims, abstention warranted to avoid "unnecessary interference by the federal courts with proper and validly administered state concerns."]; *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 814 (1976) ["[i]t is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."]. Accordingly, this case raises the critical question of whether *Burford* is avoided merely by alleging "facial" unconstitutionality of the governing statutory scheme or, instead abstention is determined by carefully balancing the federal and state interests involved.

In not balancing these interests, the majority's decision is especially troubling. First, is the adverse effect upon the State's deterrence of gambling – its core function. For decades, without interruption, South Carolina has discouraged gambling by criminalizing gambling devices and "games of chance" and forfeiting them as contraband *per se*. Now, that core state process is threatened by a federal action seeking to bypass the rulings of the South Carolina Supreme Court determining the manner in which that forfeiture system operates under state law.

Secondly, *New Orleans Public Service Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (NOPSI) recognized that *Burford* is particularly applicable where the constitutional challenge is "of minimal federal importance ...." This Court's summary affirmance in *Holliday v. State, supra* – upholding the almost identical predecessor South Carolina statutes to those attacked here, against similar constitutional challenges – should have convinced the majority to revisit its establishment of any "facial" exception to *Burford*. Disregard of *Holliday's* controlling impact undermines respect for this Court's precedents.

Moreover, the majority's decision is at odds with those in other circuits. These rulings essentially recognize that *Burford's* applicability depends not upon the claim alleged, but upon the proper balancing of federal and state interests involved and the assurance that the state procedures adequately protect constitutional claims. Other courts have concluded *Burford* is applicable, notwithstanding constitutional challenges to statutes, regulations, court rules, or local ordinances. Where the state's regulation of gambling is the subject of inquiry in federal court, *Burford* abstention has been considered particularly warranted. See, *Johnson v. Collins Entertainment Co.*, 199 F.3d 710, 720 (4th Cir. 1999) [deterrence of gambling lies "at the heart of the state's police power."]; *Chun v. State of N.Y.*, 807 F.Supp. 288, 292 (S.D.N.Y. 1992) ["(t)he scope of laws regulating gambling and lotteries is clearly a matter of predominately local concern."]

Thus, as dissenting Judge Wilkinson recognized,

Burford's applicability "in the most sensitive areas of state sovereignty [is] an issue that has been rife with conflicting approaches." *Pet. App.* a25. Unless this Court squarely addresses abstention's applicability when a "facial" constitutional challenge is made to a state regulatory regime, *Burford's* doctrine is undercut and respect for state sovereignty undermined. The majority's decision leaves the fate of abstention in the hands of the creative drafter of the complaint, who can avoid state processes by alleging the entire regulatory regime is constitutionally defective. As Judge Wilkinson observed, the majority's decision sends the "troubling message" that the abstention doctrine can be "skirt[ed]" by "characterizing claims such as this as mere facial challenges." *Pet. App.* a43.

II. THE MAJORITY'S DECISION IS INCONSISTENT WITH THE DECISIONS OF THIS COURT REGARDING *BURFORD* ABSTENTION.

A. *BURFORD* AND ITS PROGENY

In *Burford* and its progeny, this Court has ordered abstention notwithstanding the assertion of constitutional claims. *Burford*, itself involved a due process claim. Yet, this Court concluded abstention was warranted, explaining that

> [a]lthough a federal equity court does have jurisdiction of a particular proceeding, it may in its sound discretion, whether its jurisdiction is invoked on the grounds of diversity of citizenship *or otherwise*, 'refuse to enforce or protect

> legal rights, the exercise of which may be prejudicial to the public interest'; for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.'

319 U.S., *supra*, at 317-318 (emphasis added). Importantly, the state provided a "unified method for the formation of policy and determination of cases by the Commission and by the state courts." *Id.* at 333-334. Judicial review of the Railroad Commission's order was "expeditious and adequate." *Id.* at 334.

Burford's doctrine was reaffirmed in *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341 (1951). Again, a due process claim was raised. Nevertheless, the Court required abstention, explaining that

> [e]quitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts ... is convinced that the asserted federal right cannot be preserved except by the extraordinary relief of an injunction in the federal courts.' ... Whatever rights appellee may have are to be pursued through the state courts.

Id. at 349-350.

And, *Martin v. Creasy, supra,* as here, involved a constitutional challenge to a statute as written. In reversing the three-judge court's enjoining of the highway access statute as violative of the Fourteenth Amendment, the Court concluded that "[t]he circumstances which should impel a federal court to abstain from blocking the exercise by state officials of their appropriate functions are present here in a marked degree." 360 U.S., *supra* at 224. Emphasizing that the state statute provides a "procedure through which the full measure of [plaintiffs'] ... rights under the United States Constitution will be preserved ...," the Court abstained. Abstention was based upon "the unnecessary impairment of state functions."[3] *Id.*

NOPSI, supra clarified *Burford.* There, abstention was deemed inappropriate to a challenge that a rate order was federally pre-empted. *NOPSI* summarized the "*Burford* doctrine" as follows:

> [w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there

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[3] *Creasy* is a form of "*Burford* type abstention. ..." *BT Inv. Managers, Inc. v. Lewis,* 559 F.2d 950, 955 (5th Cir. 1977); Wright, Miller and Cooper, 17A *Federal Practice and Procedure* § 4244 [citing *Creasy* as a *Burford* type case]. *See also, Great Lakes Dredge and Dock Co. v. Huffman,* 319 U.S. 293, 298 (1943) ["It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."]

> are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar"; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

491 U.S., *id.* at 361, quoting *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. *supra*.[4]

B. *NOPSI* DOES NOT RENDER *BURFORD* ABSTENTION UNWARRANTED HERE

Contrary to the Fourth Circuit's suggestion otherwise, *Pet.* App. at a18, *NOPSI* does not disqualify Respondents' constitutional claims as a "candidate" for *Burford* abstention. This Court's two-pronged test specified in *NOPSI* for *Burford* applicability is alternatively stated, such that "*Burford* does not require unclear questions of state law." Davies, "Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases," 20 *U.C. Davis L.R.* 1, 11 (1986). Nor does *NOPSI* suggest in this test that "facial" constitutional claims are not subject to *Burford*. The key question for *Burford* abstention is instead whether adjudication in federal court would "unduly intrude into the processes

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[4] In *Ankenbrandt v. Richards*, 504 U.S. 689, 706 (1992), this Court suggested that *Burford* is applicable to *judicial proceedings*, as well as administrative.

of state government or undermine the State's ability to maintain desired uniformity." 491 U.S. *id.* at 363.

Thus, *NOPSI* lends no comfort to the Fourth Circuit's creation of a "facial" exception to *Burford.* Importantly, *NOPSI's* "facial" claim was based upon preemption of an order, rather than a "facial" constitutional claim. There is a considerable distinction between the two. *See, Chiropractic America v. Lavecchia,* 180 F.3d 99, 108 (3d Cir. 1999) [distinguishes preemption from a "facial" constitutional attack; "[a] reviewing federal court would be required to delve beyond the text of the regulations to adjudicate Appellants' constitutional claims."]. Moreover, it is rare that a "facial" claim sweeps away an entire statute. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) [Partial, rather than facial invalidation, is the "normal rule."]; *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) ["... when confronting a constitutional flaw in a statute, we try to limit the solution to the problem."].

Here, discriminatory enforcement is alleged. As stated in *United States v. Armstrong*, 517 U.S. 456, 466 (1996), a discriminatory enforcement claim is "not based on the ground [the statute] is unconstitutional on its face," but challenges "the manner of its administration." Such a claim is, therefore, generally a mixed question of law and fact. Unlike *NOPSI*, this claim cannot be adjudicated based upon a purely "facial" analysis.[5]

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[5] Moreover, unlike *NOPSI*, Respondents, in reality, allege certain state law violations as well as constitutional claims. They (continued...)

Likewise, Respondents other Due Process and Equal Protection contentions cannot be characterized solely as "facial" claims. A facial vagueness claim "means a claim that the law is 'invalid in *toto*' – and therefore incapable of any valid application." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n. 5 (1982). As *United States v. Mazurie*, 419 U.S. 544, 550 (1975) emphasizes, "... vagueness challenges to statutes which do not involve First Amendment freedoms must be examined *in the light of the facts of the case at hand*." (emphasis added). Respondents' Due Process and Equal Protection claims are thus not "facial" in *NOPSI's* sense. *Holliday, supra* clearly demonstrates that Respondents cannot "establish that no set of circumstances exists under which ... [these] Act[s] would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).

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[5](...continued)
assert that "[d]efendants have permitted the possession and operation of devices pertaining to games of chance that have been specifically ruled illegal in prior judicial rulings in video arcades catering to young children ...." *Pet. App.* a76. Yet, Section 12-21-2712 requires law enforcement officers to seize "any" illegal machine or device and take before the magistrate. While Respondents characterize their claim as Equal Protection-based, they also are alleging a state law violation. Moreover, Respondents' complaint asserts the goal to design and manufacture "a legal video amusement machine to be operated within the State of South Carolina," yet are "unwilling" to "risk" prosecution and seizure. *Pet. App.* at a77. In effect, Respondents argue that their machines – in contrast to others' – are "legal" under state law, i.e. not "games of chance." Thus, their contention is essentially that the state may misperceive the nature of their machines and thus "misappl[y] its lawful authority," or that the State will not "properly weigh relevant state law factors ...." *NOPSI*, 491 U.S. at 362.

Judge Wilkinson correctly recognized that Respondents' claims are not "facial." He noted that the essence of Respondents' claims are for discriminatory enforcement and to support such claim they desire extensive discovery. *Pet. App.* a43-a45. In his view, the majority "exalts form over substance ...," *Id.* at a42, in characterizing Respondents' equal protection claim as "facial":

> ... plaintiffs' equal protection challenge inevitably requires a detailed probing of South Carolina's enforcement scheme. Thus, it was clearly not an abuse of discretion to abstain from adjudicating this claim. Plaintiffs not only ask a federal court to pass upon the rationality of South Carolina's strategy for enforcing its gambling laws, but also seek to delve into the strategy's details. Such an undertaking would inevitably require the federal court to interpret and apply the state statute to various individualized decisions made by the state in the enforcement of its gaming laws.

Pet. App. a43-a44.

Moreover, as Judge Wilkinson noted concerning Respondents' "vagueness" claim, "... federal court involvement here will interfere with the detailed, individualized analysis required to determine what constitutes a 'game of chance' and will inescapably intrude upon South Carolina's regulatory system." *Id.* at a36. And, with regard to Respondents' contention that a pre-seizure mechanism is constitutionally

required, he recognized that in areas of traditional local control, "'state courts are fully competent to adjudicate constitutional challenges to local ... decisions.'" *Id.* at a47. Thus, unlike *NOPSI*, which involved a truly "facial" claim, Respondents' claims are clearly "entangled in a skein of state law" which must be untangled before any federal action can proceed. 491 U.S. at 362. In essence, Respondents' federal action is based upon a desire to "design and manufacture a legal video amusement machine [under state law] to be operated within the State of South Carolina ...." *Pet. App.* at a77. A federal court, faced with their Due Process and Equal Protection claims, will inevitably become enmeshed in the details of South Carolina's anti-gambling statute and invariably must apply the State's "game of chance" requirement to a specific factual situation. Such intrusion by the federal judiciary significantly threatens the State's interest in maintaining uniformity in the treatment of an "essentially local problem ...." *Alabama Pub. Serv. Comm'n.*, 341 U.S., *supra* at 347.

As stated, South Carolina enforces its gambling laws, based upon a "machine by machine" forfeiture analysis. An amusement machine can instantly become an illegal *per se* gambling device with a slight computer modification. *Allendale, supra.* Thus, as *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) states, the "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." Where "the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equity power and state administration of its own law.'" *Rizzo*

v. Goode, 423 U.S. 362, 378 (1976).

For all these reasons, the Fourth Circuit's reliance upon *NOPSI* or other cases for its novel "if facial constitutional claims are alleged, no possible threat to uniformity is imposed" reasoning is entirely misplaced. Indeed, such analysis is at odds with this Court's decisions regarding the applicability of abstention to constitutional claims. *Moore v. Sims, supra*, although a *Younger* abstention case, is highly instructive. There, abstention was warranted even though Plaintiffs facially attacked provisions of Texas law authorizing emergency custody of children. As the Fourth Circuit did here, the District Court refused to abstain, intimating that Plaintiffs' challenge to the entire Texas statutory scheme as unconstitutional rendered abstention inapplicable. Justice Rehnquist demonstrated why such reasoning is flawed:

> [t]hus, the District Court suggests that the more sweeping the challenge the more inappropriate is abstention, and thereby inverts traditional abstention reasoning. The breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it. This is evident in a number of distinct but related lines of abstention cases which, although articulated in different ways, reflect the same sensitivity to the primacy of the State in the interpretation of its own laws and the cost to our federal system of government in federal court interpretation and subsequent

> invalidation of parts of an integrated statutory framework.

442 U.S., *supra* at 427 (emphasis in original). While *Moore* involved *Younger* abstention, *Burford* and *Younger* are closely related. *Monongahela Power Co. v. Schriber*, 322 F.Supp.2d 902, 915 (S.D. Ohio 2004). *See also, NOPSI*, 494 U.S. *supra* at 365 ["... the mere assertion of a substantial federal constitutional challenge to state action will not alone compel the exercise of federal jurisdiction."].

C. THE MAJORITY CREATED AN EXCEPTION TO *BURFORD* UNRECOGNIZED BY THIS COURT

Accordingly, in fashioning an exception to *Burford* for "facial" constitutional claims, the majority wrongly applied *Burford* cases, including *NOPSI*. Again, *Quackenbush, supra*, rejects a "rigid" or "*per se*" approach to *Burford*. While *Burford* requires a "balance [which] only rarely favors abstention," still, that "balance" must be made.[6] It is error to determine

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[6] True, the Court of Appeals ostensibly applied the test for *Burford* abstention articulated in *NOPSI*, *See*, 491 U.S. at 361-363. Yet, clearly the so-called "facial" attacks Respondents make against South Carolina's statutes drove the majority's analysis. Moreover, as Judge Wilkinson noted, the majority's conclusion that no difficult questions of state law are here involved is incorrect. The District Court, faced with Respondents' vagueness claims, will inevitably become enmeshed in applying the statutes "pertaining to games of chance" language on a machine-by-machine basis as state law requires. Further, concerning Respondent's claim that no mechanism for advance approval of a class of machines exists, the District Court will again run

(continued...)

that an attack upon the statutes "as written" results in *Burford* abstention's inapplicability. Although the fact that a state policy may be overturned is no reason to abstain, 491 U.S., *supra*, at 363, a "facial" constitutional attack upon a state policy or state regulatory statutes *is no reason not to abstain. See, Creasy, supra*; *Moore v. Sims, supra, Colorado River*, 421 U.S., *supra* at 815, n. 14 [Although the burden may be greater, *Burford* may apply, even where there is "a federal basis for jurisdiction."] Rather than concluding that "facial" constitutional attacks upon the state's regulatory scheme are not "proper candidates" for *Burford*, a federal court must carefully balance federal and state interests, determining whether "the State's interests are paramount and that a dispute would best be adjudicated in a state forum." *Quackenbush.*, 517 U.S. *supra* at 728.

The majority failed to engage in such balancing, giving no weight to the fact that state law assigns to a magistrate the determination of legality of all gambling devices seized, subject to timely and adequate judicial review. Instead, the Court severely devalued the State's interest in prohibiting gambling and in maintaining uniformity in that deterrence – by placing all emphasis upon Respondents' "facial" claims. And, by discounting completely the inevitable entanglement of Respondents' claims with South Carolina's regulatory anti-gaming scheme aimed at "games of chance," the majority was also unfaithful to *Burford*. Such an analysis undermines the flexibility which *Burford* encourages and thwarts the principles

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[6](...continued)
headlong into the machine-by-machine requirement of state law.

of federalism and comity which *Burford* protects.

III. THE MAJORITY'S DECISION FURTHER ADDS TO THE CONFUSION IN LOWER FEDERAL COURTS REGARDING *BURFORD'S* APPLICABILITY, AND IS INCONSISTENT WITH DECISIONS IN OTHER CIRCUITS AS WELL AS THE FOURTH CIRCUIT.

Judge Wilkinson's dissent expressed concern about the reigning confusion in the lower federal courts over *Burford's* applicability, noting that the "issue [is] rife with conflicting approaches." *Pet. App.* a25. Other commentators agree wholeheartedly with his assessment. As one authority has observed, "[c]onfusion over the scope of *Burford* abounds ...." Young, "Federal Court Abstention and Administrative Law From Burford to Ankenbrandt," 42 *DePaul L. Rev.* 859, 866 (1993). And, as another commentator has written,

> [m]uch confusion surrounds the factors federal courts should consider in deciding whether to grant *Burford* abstention ... . Supreme Court formulations of *Burford* have been abstract, leading to a variety of views concerning its requirements among the federal circuits.

Wise and Christensen, "Sorting Out Federal and State Judicial Roles In State Institutional Reform: Abstention's Potential Role," 29 *Fordham Urb. L. J.* 387, 399 (2001). By adopting a "*per se*" rule for so-called "facial" challenges, the majority compounds the

confusion dramatically.

Decisions in other circuits disagree with the Court of Appeals' "facial" exception. For example, the Fifth Circuit has stated quite clearly in *Sierra Club v. City of San Antonio*, 112 F.3d 789, 795 (5th Cir. 1997) that "*Burford* abstention does not so much turn on whether the plaintiff's cause of action is alleged under federal or state law, as it does on whether the plaintiff's claim may be 'in any way entangled in a skein of state law that must be untangled before the federal case can proceed.'" And, in *Capital Bonding Corp. v. New Jersey Supreme Court*, 127 F.Supp.2d 582 (D.N.J. 2001), the District Court abstained under *Burford* notwithstanding that Plaintiff's claim constituted a "facial challenge" to a New Jersey Supreme Court rule for notice and removal of insurers from the New Jersey Bail Registry. The Court noted that "[w]e are thus presented with murky federal constitutional claims of questionable merit." *Id.* at 595. Finding that the "Plaintiff has ample opportunity for review of the new Rule and any implementation thereof," *Id.*, at 594, the Court relied upon the Third Circuit's decision in *Chiropractic America v. Lavecchia*, *supra*, in abstaining under *Burford*. Quoting *Lavecchia*, which involved *Burford* abstention in the context of constitutional challenges to chiropractic regulations, the *Capital Bonding* Court stated that

> "... certain matters are of state concern to the point where federal courts should hesitate to intrude; and they may also concern judicial 'economy,' the notion that courts should avoid making duplicate efforts or unnecessarily deciding difficult

questions."

127 F.Supp.2d at 591, quoting *Chiropractic America*, 180 F.3d at 103 (quoting *Bath Memorial Hospital v. Maine Health Care Fin. Comm.*, 853 F.2d 1007, 1012 (1st Cir. 1988)).

An earlier Fourth Circuit decision, *Fralin and Waldron, Inc. v. Martinsville*, 493 F.2d 481 (4th Cir. 1974) is also inconsistent with the Court of Appeals' reasoning in this case. *Fralin* involved a constitutional challenge to a zoning ordinance. As here, Plaintiff's claims raised questions of vagueness and arbitrary enforcement. Yet, the Fourth Circuit required abstention, because state adjudication would "avoid needless friction in federal-state relations over the administration of purely state affairs." 493 F.2d, *Id.* at 483. *See also, Russell v. Giles County*, 105 F.Supp.2d 841, 848 (M.D. Tenn. 2000) [the Court abstained under *Burford* even though constitutional claims were mounted against the Tennessee Public Indecency Act.]; *Int'l. Eateries of America, Inc. v. Bd. of County Commrs.*, 838 F.Supp. 580 (S.D.Fla. 1993) [*Burford* abstention warranted in suit challenging constitutionality of adult entertainment ordinance].

Another case, *Jernigan v. State of Miss.*, 812 F.Supp. 688 (S.D. Miss. 1993), referenced by Judge Wilkinson in his dissent, is also highly instructive. While not directly involving *Burford* abstention, this case employed an abstention approach which is the polar opposite of the Fourth Circuit's reasoning. *Jernigan* involved the application of a gambling statute similar to Sections 12-21-2710 and 12-21-2712. Plaintiff sued in federal court claiming his machines

were legal under Mississippi law and their use thus protected by the federal Constitution. Seizure of his machines, he argued, deprived him of property without due process.

The District Court, however, abstained under *Younger v. Harris*, *supra*. Relying upon a similar Third Circuit decision, *Pennsylvania Video Operators v. U.S.*, 731 F.Supp. 717 (W.D. Pa. 1990), *affd.*, 919 F.2d 136 (3d Cir. 1990), the Mississippi Court concluded as follows:

> ... Jernigan claims that he will lose money if state or federal law enforcement officials seize his video poker machines. However, the court ... does not view this as "a potential irremediable constitutional violation of sufficient magnitude to warrant the interference of this court in either state or federal law enforcement."
>
> ... [N]either can declaratory relief properly be granted .... [P]laintiff alleges ... that his due process right to "a hearing, prior to the seizing of [his] equipment or personal property" is threatened ... by criminal proceedings. Defendants argue, *inter alia*, that plaintiff has no property interest in his video poker machines and that ... his due process rights could not be implicated by any seizure of those machines. Jernigan does not dispute that the ownership, possession, control or transportation of machines such as his

> could be declared illegal by the state legislature or by Congress as a valid exercise of government police powers. Nor does he dispute that he would not have a property interest in the machines if they had been declared illegal by these statutes. His claim appears to be simply that his machines are not, in fact, "gambling devices" within the meaning of any of the subject statutes. ... [H]e wants an injunction against defendants' seizing his machines or prosecuting him for his ownership of these machines. It is apparent from the record in this case that the question whether a particular machine is a "gambling device" depends, under either state or federal law, on the various features of the machine.... [C]onsideration of the various characteristics of each game and machine is the core of analysis under the statute.

812 F.Supp. at 692-693. The Court's reasoning in this case vividly illustrates why Judge Wilkinson's dissent was correct. Without abstention, the federal court inevitably will be required to plunge headlong into the thicket of South Carolina gambling law. A federal district judge will necessarily function as a "super magistrate" in this case.

Accordingly, the lower federal courts do not read *Burford* consistently. This Court should reconcile these varying approaches.

IV. *BURFORD* ABSTENTION IS ESPECIALLY APPLICABLE HERE BECAUSE OF THIS COURT'S SUMMARY AFFIRMANCE IN *HOLLIDAY*, WHICH REJECTED SIMILAR CONSTITUTIONAL CHALLENGES MADE AGAINST THE VIRTUALLY IDENTICAL SOUTH CAROLINA STATUTES IN QUESTION IN THIS CASE.

A. *HOLLIDAY* DECISION

The State's interest in having this case "adjudicated in a state forum" is substantially enhanced by this Court's summary affirmance decision in *Holliday*, *supra*. Undoubtedly, the "minimal" nature of the constitutional question was important in the *Burford* decision to abstain. *NOPSI*, 491 U.S., *supra* at 361.

Likewise, based upon *Holliday*, the Respondents' constitutional issues are of "minimal federal importance." For purposes of Respondents' claims, the similar predecessors to the current South Carolina forfeiture statutes were upheld as constitutional against Due Process and Equal Protection Clause challenges – Respondents' same claims here. *Pet. App.* a68-a81. Like Respondents, Holliday brought a pre-enforcement federal action to enjoin these provisions. Holliday claimed these South Carolina statutes were

> unconstitutional, null and void and in violation of the Fourteenth Amendment ..., because the statutes treat, embrace, regard and include the same coin-operated amusement machines of the

> plaintiff as gambling devices *per se* and subject them to seizure and destruction as gambling devices *per se* although they are ultimately innocent and are not gambling devices *per se*; that their intended seizures and destruction, or any seizures and destruction of them are and would be, in violation of plaintiff's constitutional rights ....

78 F.Supp. at 921. As today, South Carolina law then banned devices "pertaining to games of chance of whatever name or kind." Moreover, the statutes in *Holliday* mirrored present § 12-21-2712, requiring law enforcement to seize machines and take before a magistrate for review and subsequent destruction.

A three-judge Court concluded that Holliday's machines were "games of chance" because they "do not give a certain uniform return value for each coin deposited." *Id.* at 925. Thus, the federal question was whether South Carolina's anti-gambling laws violated the Fourteenth Amendment. Concluding that "South Carolina's policy is to suppress gambling," which "is illegal in South Carolina," *Id.* at 921, the three-judge court held that the forfeiture statute is "clearly a valid exercise of [South Carolina's] ... police power ... and constitutes no attempt on the part of the State to deprive plaintiff of his property without due process of law." *Id.* at 925.

Holliday appealed to this Court (Appellant's *Jurisdictional Statement*, *Pet. App.* a131-a139), asking whether the South Carolina anti-gambling statutes violated the Due Process and the Equal Protection

Clauses. *Id.* at a138. Holliday's *Jurisdictional Statement* asserted that the gambling statute "has no basis, is arbitrary and denies to the plaintiff his fundamental rights under the equal protection of the law clause and due process of law clause under [the] ... 14th Amendment...." *Id.* This Court, however, expressly affirmed the three-judge Court. 335 U.S. 843, *supra.*

B. EFFECT OF *HOLLIDAY*

In *Mandel v. Bradley*, 432 U.S. 173, 176, (1977), this Court stated that

> [s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by these actions.

And, in *Hicks v. Miranda*, 422 U.S. 332, 340 (1975), a summary affirmance sustained "the constitutionality of the very California obscenity statute ..." before the Court. *Hicks* held it error to disregard this Court's decision because, where the issues "are substantially the same," the summary affirmance is dispositive. *Id.* at 345, n. 14. The Court also has concluded that determination of whether particular issues are "fairly comprised" within the *Jurisdictional Statement's* questions is "not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559, n. 6 (1978). *See also, Comm. Party v.*

Whitcomb, 414 U.S. 441, 451, n. 1 (1974) (Powell, J., et al., dissenting) [jurisdictional statement "'to include every subsidiary question fairly comprised therein....'"].

Accordingly, *Holliday* concluded that South Carolina statutes, similar to their current version, are valid under the Due Process and Equal Protection Clauses. Such ruling includes upholding the very statutory language Respondents attack as vague – "pertaining to games of chance of whatever name or kind." Respondents' constitutional claims are thus "fairly included" within *Holliday's* issues decided. While Respondents assert a "void-for-vagueness" claim, it is virtually the same one Holliday made here – that "plaintiff's business [selling alleged gaming devices] is inherently innocent ...." *Pet. App.* a131-a160, a138. Holliday argued that South Carolina's forfeiture statutes in making games of chance illegal *per se* "is arbitrary and denies to the plaintiff his fundamental rights under the equal protection clause and due process of law clause ...." *Id.*

Generally, laws designating "innocent" conduct criminal are candidates for void-for-vagueness claims. *See, City of Chicago v. Morales*, 527 U.S. 41, 53 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972). Moreover, "'the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Gonzales v. Carhart*, ___ U.S. ___, 127 S.Ct. 1610, 1616 (2007), quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In *Holliday*, this Court rejected arguments that the statutes' breadth permitted

the arbitrary and discriminatory punishment of innocent conduct. By summarily affirming the three-judge court, the Court allowed the State to proceed against Holliday's machines. If this Court had thought that the phrase "pertaining to games of chance" was unconstitutionally vague in violation of the Due Process Clause – a Clause Holliday asserted the statutes violated – the three-judge court's judgment would not have stood. Indeed, the three-judge court defined "games of chance" as those not giving "a uniform return for each coin deposited." 78 F.Supp. at 925. Neither this Court nor the three-judge court deemed such a definition unconstitutionally vague.[7]

Further, Respondents' constitutional challenge to lack of a pre-enforcement mechanism was also necessarily decided in *Holliday*. Indeed, at the time *Holliday* was adjudicated, both federal and state courts had ruled – in accordance with *Lawton v. Steele*, 152 U.S. 133 (1894) – that an owner whose machines were seized pursuant to the South Carolina statute was entitled to no pre-seizure hearing under the Due Process Clause. *See*, *Durant v. Bennett*, 54 F.2d 634 (W.D.S.C. 1931) [judicial intervention after seizure is constitutionally sufficient]; *State v. Kizer*, *supra* [same], overruled in part by *State v. 192 Coin-Operated Video*

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[7] The three-judge court relied upon previous interpretations of the state Supreme Court, such as *Alexander v. Martin*, *supra*. For purposes of vagueness, this Court has recognized that such claims must be adjudged in light of the statute's construction by the highest court of the State. *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973). Thus, there has never been any difficulty in construing the statute's language and this Court in *Holliday*, having *Alexander v. Martin* before it, saw no such difficulty.

Game Machines, supra [post-seizure hearing required, based upon *Calero-Toledo v. Pearson Yacht Leasing Co*, 416 U.S. 663 (1974)]. Whether Respondents' contentions are based upon Equal Protection or procedural Due Process, *Holliday* necessarily disposed of the claim by allowing state enforcement to proceed.

In short, the claims in *Holliday* and this case are essentially the same – that South Carolina statutes arbitrarily punish innocent conduct ("legal" machines). Yet, *Holliday* found no Due Process or Equal Protection violations in these statutes.[8] Nevertheless, the majority still refused to invoke abstention even though *Holliday*

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[8] Also, the Court has spurned the Due Process and Equal Protection arguments which Respondents make in this case in the specific context of treatment of contraband *per se* and the regulation of gambling. A state is afforded considerable constitutional leeway in the exercise of its police power to regulate gambling. *See, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986); *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993) ["gambling ... implicates no constitutionally protected right."]. Moreover, in *Lawton v. Steele, supra*, the Court held that destruction of "public nuisances," such as gambling instrumentalities, may be accomplished, consistent with Due Process, by "summary" proceedings. And, in *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, no preseizure proceeding was required for the forfeiture of contraband.

Further, the Court has also reviewed a federal statute similar to South Carolina's and rejected the claim that the language therein – "involved an element of chance" – is void for vagueness. *United States v. Korpan*, 354 U.S. 271 (1957).

Accordingly, the constitutional claims in this case have long been decided by this Court, thus furthering the necessity for *Burford* abstention here. The federal interest in this case is clearly "minimal."

renders Respondents federal claims and the need for having the matter decided by a federal court as "minimal." Undoubtedly, "lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'" *Hicks v. Miranda*, 422 U.S., *supra* at 334. Accordingly, the District Court's decision to abstain should have been affirmed.[9]

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[9] While *Burford* was not raised in *Holliday*, – a case decided in 1948 long before *Burford* was fully established – it is easy to see from *Holliday* how a federal court will inevitably become "enmeshed" or "entangled in a skein of state law." *NOPSI*, *supra*. In *Holliday*, the three-judge court first had to determine whether in-line pin games were "game of chance" under South Carolina law before it could address Holliday's constitutional claims against South Carolina's forfeiture statutes. Today, even more so, – where legality is adjudged on a "machine-by-machine" basis – it is clear that a federal court will necessarily become entangled in the intricacies of state law. As in *Holliday*, the federal court will be required to insert itself into South Carolina gambling law before it can proceed to decide the federal issues before it. Judge Wilkinson, in his dissent discusses this entanglement at considerable length. See, *Pet. App.* a36-a50.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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